TRANSFER OF LAND IN OLD ENGLISH LAW.

ONE of the difficulties which ancient law has to master in its growth is the opposition offered by tribal custom to the alienation of land. Land is not originally regarded as a conveyable or transferable commodity: even after it has been appropriated by separate households some time elapses before the occupiers of the different plots and holdings acquire the right to dispose of them in the market, to give, sell, exchange, mortgage, and bequeath them. The property remains vested in the social group from which individual tenants draw the title and guarantee of their occupation. This view is the natural one in an age when the occupation of the land was effected for the purpose of hunting or pastoral pursuits, but it is maintained for some time even when the tribe, as it were, strikes root in the soil through agriculture. The claim of kinsmen to keep strangers out as to land coming from the kindred and which ought to go back to the kindred is asserted in the primitive legal customs of various tribes, and, to speak only of European nations, we find individual ownership making way against it with some difficulty in the laws of the Greeks and of the Romans, of Celts, Teutons, and Slavs.[1]

One of the most powerful agencies which helped to overthrow tribal notions on this subject in medieval Europe was the influence of the law of civilized Rome when brought to bear on barbarian communities. With the help of the Church and of kings, who in consequence of their exalted position were quicker to realize the advantages of the new order, Roman ideas and forms made their way against ancient custom, and in the struggle in regard to the right of alienating land one of the most important steps was the introduction of written instruments framed on Roman patterns to convey title. The history of *bócland* in England is one of the varieties of the gradual transformation of land law in this direction,[2] and it finds its parallels on the continent in the use of "formulæ"

[1] I will content myself with referring to P. Viollet, Histoire du Droit Civil Français, 3e éd., 555 ff.; Brunner, Deutsche Rechtsgeschichte, 2 ed., i. 281; Blumenstock, Entstehung des Immobiliareigenthums.

[2] On *bócland* see a paper of mine in a forthcoming volume of essays dedicated to Professor Fitting.

of Roman origin which provided the models for Frankish, Germanic, and Lombard conveyancing.

On the continent we notice, however, that by the side of the deeds of Romanistic origin other forms of transfer are developed, which remain in closer touch with native legal custom and are evidently more suited for country life than the elaborate and costly productions of royal chanceries and ecclesiastical scribes. In Frankish law, for instance, although the Salian Code does not even mention written deeds like those illustrated by Marculf or executed by Merovingian kings and bishops, it describes at some length a ceremonial process by means of which a person could pass over his household property to another.[1] This was done in a solemn way, in the presence of neighbors, by the act of throwing a stick into the lap of a middleman, who entered into possession and acted as the master of the house by treating guests to a meal of porridge. Ultimately he delivered the house by throwing the stick into the lap of the intended donee. The procedure described is not merely a quaint local custom; it gave rise to a continuous tradition of legal formalities which seems reflected, among other things, in the surrender and admittance practices of English manorial courts.[2] Evidently there was frequent occasion for the use of such ceremonial acts in every-day practice.

There can be hardly a doubt that similar customs obtained in Old English law by the side of the book-right conveyances initiated by royal privilege. It cannot be assumed that alienations and transfers of land were carried on exclusively by means of written documents in the case of the small freemen of Lincolnshire or East Anglia, who, according to Domesday evidence,[3] had power to do with their land what they pleased. As, however, our materials are almost exclusively drawn from books, we need not wonder that we hear very little about the less "bookish" forms of transfer. They consisted probably in ceremonial actions before popular courts, among which the handing over of a sod must have played a prominent part.[4] But otherwise there is a good deal of uncertainty as to the proceedings, and to this uncertainty part of the confusion

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[1] Lex Salica, 46. I do not see sufficient reason for limiting the meaning of the "*affatomia*" to donations *mortis causa*.

[2] Villainage in England, 371.

[3] *Cf.* Maitland, Domesday and Beyond, 257.

[4] Brunner, Zur Rechtsgeschichte der Urkunde, 188; Heusler, Institutionen des deutschen Privatrechts, 67 ff.

in the doctrines as to title in Anglo-Saxon law may perhaps be ascribed.

It is unfortunate under these circumstances that an interesting Old English document throwing light on the customary mode of transfer of land and suggesting obvious comparisons with the legal practices of neighboring nations should have been as good as overlooked by students. The document I mean belongs to the Peterborough evidence, to which we owe so much valuable information about Saxon and Norman antiquities, — especially the Northamptonshire Geld Inquest, published by Ellis, and the Survey of 1125, published by the Camden Society.[1] The same Codex 60 of the Society of Antiquaries in London, which contains these historical materials, gives an account of some dealings of the Bishop Æthelwold of Winchester directed towards the restoration of the Mercian monasteries, destroyed by the Danes, at some time about 963–972. Kemble published only one of the entries of this account,[2]—the picturesque story of the land confiscated by the king after the drowning at London Bridge of a woman guilty of practising pin-sticking charms. Another fragment from the same source[3] had been given in the 1817 edition of the Monasticon Anglicanum. It treated of the resumption for Medhamstead of the old site of the monastery and one or two other estates. But the bulk of the account was published by W. de Gray Birch.[4] In any case all the statements of this account have been before the public since 1893, and the fragments printed in the Monasticon and by Kemble since 1817 and 1848; but, unless I am much mistaken, their legal contents have never been commented on, although they have an evident bearing on several problems which have been lately much discussed by lawyers and antiquarians.[5]

I do not think such complete neglect would have been justified, even if the document in question were proved to be a forgery. Some of the early forgeries are quite as valuable for institutional inquiries as genuine documents, because the falsifiers had to conform to existing legal rules and established formulæ in order to achieve their purpose. And, after all, it is not the particular

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[1] Introduction to Domesday, 184; Camden Society Publications, 1849, vol. xlvii.

[2] Cod. Dipl., 591. *Cf.* Thorpe, Diplomatarium, 229.

[3] Monasticon Anglic., i. 382; Thorpe, 243.

[4] Cart. Sax., iii. 1128, 1129, 1130, 1131.

[5] Al. Bugge has lately referred in passing to the shiremoot in Northampton. Vikingerne, ii. 315.

interests but the general legal frame that is of importance for us. But there does not even seem to be any ground for doubting the genuineness of the narrative in question. It has come down in a twelfth century transcript, and in one or two cases the copyist may have touched up the older text by introducing a familiar local name.[1] But in other respects there are no external traces of falsification about the narrative, and it contains on every line statements speaking for its genuineness. It is not one of the pompous charters manufactured to establish ecclesiastical claims, of which so many have come down to us from nearly every see and abbey, and of which there are conspicuous instances among the records of Peterborough.[2] It is, on the face of it, a compilation of memoranda for private use bearing on the estates and the movable property of the monastery, and not likely to impress any court in a struggle as to title. The contents of these memoranda are exceedingly disparate; besides short notices about purchases, grants, and exchanges of land, there occur entries about the books bequeathed to the abbey, precious objects of ecclesiastical apparel (*madmas*), inventories of stock on one or two of the estates, and notices as to the number of laborers on them. A great many of these memoranda had no practical value for anybody but the monks themselves, and not much interest for people who were not contemporaries. What use could be made for any iniquitous purpose of the fact that the library of Medhamstead possessed a copy of a Liber Bestiarum or an exposition of Hebrew names, or that there were 305 sheep and a harrow in Yaxley at some not specified time? And even the records of transactions as to land derived their practical importance only from references to men and institutions which could stand witness and security in regard to them: they do not lay claim to any formal authority. As a matter of fact the genuineness of characteristic parts of the

[1] In the entry about the sale of land at Yaxley and Farsheved, Hunts, which occurs twice (Cart. Sax., iii. 368 and 370), the words "*into Burch*" are introduced in a pleonastic way in the first instance. In the second the MS. omits Jacesle and Faresheved and speaks of land *æt Burch*. Now we know from the Peterborough MS. of the Chronicle that Medhamstead received the designation of Burgh, Burgus S^ti^ Petri, Peterborough, in consequence of the fortifications constructed by Abbot Kenulf, Ældulf's successor (Sax. Chr. A. D. 963), so that the word "*Burgh*" must have been introduced into the record of the transaction by a later hand. It occurs again in the document relating to Ailsworth (Cart. Sax., iii. 372).

[2] *E. g.*, the charters attributed to Edgar (Cart. Sax., 1258, 1280). The document of 972, inserted in the Chronicle and affecting the form of a dialogue between King Edgar and Archbishop Dunstan, is hardly more genuine.

memoranda has been assumed without any contradiction.[1] And if we may use them in forming a view as to the contents of a monastic library, or as to a piece of folk-lore, like the charm of pin-sticking, there is no reason why we should not use them for the purpose of ascertaining legal customs and economic conditions.

The data provided by the memoranda, though they will help us to clear up obscure and doubtful points, do not clash in any way with facts ascertained on the strength of other evidence. I will speak in the present paper only of the information they supply on the modes of transferring land, and, incidentally, on the contact of Old English and Scandinavian law revealed by our document.

Bishop Æthelwold of Winchester, and Abbot Ealdulf, who acted with him for the restoration of Medhamstead, did not draw up "books" in order to formulate and confirm their transactions with various persons of whom they acquired land for the purpose in view. They recorded their dealings in writing, but the records in question were private notices or memoranda about proceedings which had taken place in court or before witnesses, and the interest of these notices lies in the fact that they give us some particulars about the forms and conditions observed in such cases.

It ought not to be overlooked that the wholesale restoration of property and rights, under pressure of King Edgar's power, must have involved some kind of expropriation for the benefit of the monastery, and that the sales and exchanges effected were concluded under extraordinary circumstances, sometimes perhaps with a more than usual display of public machinery. Yet it is highly improbable that the forms used should have differed substantially from the ordinary modes of transferring land. However one-sided an affair these bargains may have been, they had to conform to the ordinary requirements of *bonâ fide* bargains in order to avoid any pretext for a subsequent breach or reversal of the transactions. The materials supplied by the record concern mainly three points: the action of the parties to the transfer; the part played by witnesses and sureties; the intervention of public courts.

1. Most of the transactions referred to are purchases of land. In twenty-four instances land is expressly said to be bought or sold, while in five, though the fact of purchase is not mentioned, the transaction alluded to can hardly have been anything else but

[1] *E. g.*, Plummer, Notes to A. S. Chronicle, ii. 155.

this most common one. In two cases the transfer of property was a consequence of forfeitures incurred by criminals, one refers to a grant, one to an exchange, and one to a grant combined with an exchange. Thus references to sales form the bulk of the Peterborough memoranda. Let us remember that proper deeds of sale do not occur in the collection of Anglo-Saxon land books. Although written instruments very often treat of transactions based on purchase, the form of a contract of sale was not used by the Anglo-Saxon clerks. The transaction took the shape of a grant, with an occasional mention of a certain sum paid by the buyer.[1] In the case of the Medhamstead memoranda the ceremonial transactions recorded are emphatically sales. Their technical designation is *landceap*.[2] We possess a law of Æthelred of 997 enacted at Wantage, that "*landcop*" should stand as well as the lord's gift, "*lahcop, witword*," and "*gewitnes*."[3] The law of the Northumbrian priests repeats this enactment, adding some other items, "*drikkelaun, riht dóm, fulloc, frumtalu*."[4] We need not dwell on all the details of this enumeration of legal acts that "should stand." It is important to notice that a new departure is sought in regard to them, — matters which may have been doubtful or insufficiently secure before were to be guaranteed for the future. The intention was evidently not only to reassert the power of existing laws, but to confirm the legal value of customs which were yet new and not sufficiently recognized in England. Where these customs mostly came from is made clear by some particulars of their list. *Witword* is a technical Norse term: it means the assertion of a right by a party to whom the way to such assertion is legally open:[5] a party substantiating his claim by an oath, a party to whom the privilege of proof has been conceded,

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[1] For a characteristic instance of a donation subsequent to a sale, see Cod. Dipl., 282 (A. D. 859), Brit. Mus. Facs., ii. 34. To "sell" in Old English was simply to give or to grant. Cod. Dipl., 226 (Earle, Landcharters, 80).

[2] On þissum ge write cyð hwet þa festermen synd þes landes ceapes þe Adeluuold C. gebohte æt mislicum manum ut on Wiðeringa eige (p. 370).

[3] Æthelred, iii. 3 (enacted at Wantage, about 997).

[4] Northumbr. pr. l. 67, § 1.

[5] Amira, Nordgermanisches Obligationenrecht, i. 91 ff. The explanation adopted in the text is mainly supported by the use of the word in Swedish laws (*cf.* Schlyter, Sveriges Gamle Love, Glossar. s. v. *vitsord*). The Norwegian, Danish, and English use was more lax. Steenstrup, Danelag, 188; Hertzberg and Bugge, Norges Gamle Love, V. s. v. *vitorð*. Still the term has to be kept distinct from the meaning of "testimony," as it is contrasted with *gewitnes*. *Cf.* Lieberman, Glossar. to the A. S. Laws, and Bosworth and Toller, A. S. Dictionary, s. v.

possess the *witword*, and such *witword*, if successful, ought to stand. *Lahcop* is the Danish word for reintegration to one's lawful standing by the payment of a fine. It is the counterpart of the Danish *lahslit*. Not less specific is the *drikkelaun*, introduced by the Northumbrian priests: it finds its best explanation in the Norwegian Gulathing's Lov, 270, where it appears as one of the modes creating title to odal land: it is derived from the king's grant in recompense for hospitality on a royal progress.[1] The *gewitnes*, lord's gift, and *landceap* are not so specifically Scandinavian; but yet this latter, which mainly concerns us, appears in Æthelred's law, not in its English form, but in the Norse — *landcop*. It looks as if the enactments in question were the result of a policy of legalizing the conditions under which the Danes were settling in the island. That these decrees were not mere words may be gathered, *e. g.*, from a charter in which land acquired by Archbishop Ealdred is classified under the two heads of *witword* and *caupaland*, — land successfully claimed, or bought by him, as I should like to translate it.[2]

To revert to our document, it presents a copious collection of cases illustrating the practice of *landceap*. How far this practice went back to Old English roots and to what extent it was the result of Scandinavian influence, it would be impossible to tell, but in the Northamptonshire document before us it certainly appears in Scandinavian surroundings.[3]

The payment of a price is sometimes mentioned in the memoranda and sometimes omitted.[4] On one occasion we are told that the price was paid by instalments, and the transaction was apparently held to be perfected by the payment of the "last money."[5]

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[1] Steenstrup, Danelag, 186.

[2] Thorpe, Diplom., 439.

[3] The Codex 60 of the Society of Antiquaries contains a charter in which the expression "*to fullon ceape*" occurs, f. 50, d. "Ðis is seo feorewearde þe Vlf and Madselm his gebedda worhtan wiþ and wiþ Sce Peter þa hig to Ierusalem ferdon. Ðat is þat lond æt Carlatune into burh . . . and þat land æt Bytham into Sce Guthlace, and þat land æt Sempringaham into Sce Benedicte to Ramesege, and þat land æt Lofintune and hæt (*sic*) heordewican Ealdrede biscope to fullon ceape. . . . and lindbeorghe habban mine cnihtas gif ic ham ne cume." The bishop Ealdred is probably the well-known Archbishop of York, and the document quoted may have been drawn up sometime in the sixties. Thorpe, Diplom., 594.

[4] *E. g.*, "þa bohte man æt tuce and æt hire sune clacce 60 aecera aelc mid x penegum." But an entry may also run: "Ðis synd þa festermen þe Æincund funde Ældulfe ab. æt þan lande æt Anlafestune þa he æt him bohte," etc.

[5] P. 368: "Ða Æþeluuine eðe aldorman and Æaldulf biscop sealdan Æthestane and

The formalities of tradition are not described in these private notices. From the fact that books frequently mention a symbolic investiture by the sod, which has no necessary connection with the drawing up of the book, it may be gathered that the delivery of the sod was the characteristic symbol of tradition in the *landceap*. It occurs both on the English[1] and on the Scandinavian side. In Denmark as in Sweden, in Norway as in Iceland, the regular act by which the ownership of land was transferred, in consequence of a grant, sale, or exchange, was the *skötning* (*skeyting*),[2] — the placing of a sod into the lap of the person acquiring the property, an act reminding us forcibly of the *in laisum jactare*, the throwing of a stick into the lap of the grantee, in Frankish law. Tradition by passing the sod occurs in English charters of the period preceding the Danish invasions, and we have to consider it, not as an importation from Scandinavian parts, but as a ceremony common to both nations, and probably going back to early Teutonic roots.[3]

In one case the person selling land acts with the consent of his brothers,[4] but in most instances relatives are not mentioned, and it is evident that their intervention was not required to render the transaction valid. The form of transfer of property under discussion implies already an emancipation from the strict rules as to the claims of family and kindred excluding the power of disposal by individual owners. It belongs to a more modern stage of social evolution than the régime of strict settlement under *mægths* which prevailed in the ancient law, and against which the early books were directed.

The connection between outlawry and transfer of land is not quite obvious on the face of the records. In one case the land belonging to the widow and her son who practised pin-sticking fell to the king; the latter granted it to a thane, and this thane exchanged it against another estate given by Bishop Æthelwold.[5] So far there is no difficulty. But in two other cases estates are not said to fall

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Alfwolde for Jacesle and Faresheved þone latostan pænig . . . þa ueron þer festermen," etc.

[1] *E. g.*, Cod. Dipl., pl. 114 (A. D. 759–765).

[2] Steman, Dansk Retshistorie, 465; Hertzberg and Bugge, Glossar. in Norges Gamle Love s. v. *skeyting*; Beauchet, Histoire de la Propriété Foncière en Suède, 255, 330. Amira, Nordgermanisch. Oblig., i. 512 ff.; ii. 625 ff.

[3] Heusler, Institutionen des deutschen Privatrechts, ii. 70.

[4] P. 369: "Ðis sind þa festermen þe Friðolf and his brodra fundel (*sic*, corr. fundon) Ældulfe aþ æt þat lande æt Waltune."

[5] Cart. Sax., 1131, p. 372 f.

to the king in consequence of outlawry, as they would have done according to the later law of Canute II. 13. The action of the persons passing the estates to the bishop is characterized by the terms *geald, guldon*: they "pay in" such and such an estate for an outlawry.[1] The outlawry itself is said to be "wrought" on some one — Wulfnod or Styrcyr. The expression "outlawry" (*útlagu*) is thus used loosely for a crime involving outlawry, and the transfer of the estates may have been made to pay off a fine — the *wergeld* in the case of Styrcyr. But why should Bishop Æthelwold receive such fines? It is hardly to be assumed that he got them as a relative of the slain, or even as a lord. It seems that we have in this case a parallel to the anonymous memorial, most probably drawn up by an ecclesiastical magnate, in which the author tells of his intercession in favor of an outlaw, Helmstan, who had stolen oxen: the estate of the latter passed to his protector by the favor of the king.[2] There can be no doubt that the activity of the Bishop of Winchester in 963 was greatly patronized by King Edgar, and such patronage may account for the transfer of estates to Bishop Æthelwold by men who had incurred outlawry and wanted to clear themselves with the help of the bishop.[3]

Of an estate at Wermington it is said that it had been acquired wrongly by a certain Ælfweard, who made a declaration (*swutelung*) in agreement with Abbot Ealdulf that he should hold the said estate during life, and that after his death it should go to St. Peter for the sake of his soul. This agreement is said to have been corroborated by a pledge (*on his wedde gesealde*).[4] It must have concerned land which in one way or another was claimed by Medhamstead,

[1] "Ðis sind þa festermen þa Osgot funde Ealdulfe ab. æt þet lande æt Castre, þe he geald him for þam utlage þe he Styrcyr ofslogh (p. 369). Ðis sind þa festermen þe Wulfgeat and Gyrping fundon þam ab. Ældulfe þa hi þat lande guldun æt macusige for ðan utlage þa he on Wulnoðe worhte" (p. 370).

[2] Cod. Dipl., 328.

[3] It may be added that the Codex 60 of the Society of Antiquaries, p. 7, has other references to the surrender of estates in consequence of outlawry treating of events which happened about the time of the Conquest: f. 55, v: "Keteford occidit quendam Ulkytellum et pro hac forisfactura terra et silua sua fremeuuda peruenit in manu abbatis de burch. . . . Medietas silue de Copeuude et quarta pars alterius medietatis abbatis est de burch. Hæc quarta pars fuit Ægeluuardi cuiusdam, sed pro furto quod fecit in manus abbatis uenit. Et de tribus remanentibus partibus tercia pars est abbatis quæ fuit Vlf latronis."

[4] "Ðis is seo swutelung þe Ælfweard on dentune wroðte wið Ealdulf aþ þa he him þat land agæf æt Wermingtune þe he on woh genumen hæfde . . . and on his *wedde* gesealde þet land æt Wermingtune æfter his dæg into Sancte Petre for his saule on hyra gewytnesse" (p. 372).

but had got into the hands of powerful laymen. From the point of view of the monastery the latter held it wrongly, but an agreement had to be made in this case, as in many similar ones, and the church contented itself with securing the reversion of the estate, while conceding a life interest in it to its opponent.[1] The most interesting point is that the layman not only makes a grant, but confirms it by a pledge or promise (*on his wedde*). The expression *wedd* is characteristic in this context. It fits especially the case of ceremonial promises not committed to writing.[2]

2. One feature which recurs in nearly all the Medhamstead memoranda is the enumeration of *festermen*, of persons called up to participate in the transaction. The act of getting these *festermen* is described as *feste*, corroboration. The grantor or seller finds *festermen* for the donee or the buyer, while the latter is said to take *feste*.[3] These expressions lay stress on an act of confirmation by special sureties entirely distinct from the drawing up of a deed, or from the promise (*wedd*) of the principal. The function performed by the *festermen* is not identical with bearing witness: witnesses are mentioned, but their testimony is kept apart from the action of *festermen*.[4]

The term *festerman* is sometimes replaced by others — *borh*, *boruhhand*[5] — which leave no doubt as to the main function of

[1] *Cf.*, *e. g.*, Cod. Dipl., 156.

[2] Cod. Dipl., 314 (K. Alfred's will): "and hi ealle (The West Saxon witan) me ðæs hyra wedd sealdon and hyra handsetene." Earle, Landcharters, 231 (Canute's proclamation): "hit swyþe deor (sy) wiþ God to betanne, æt man aðas, oððe wedd tobrece."

[3] In several of the entries already given *festermen* occur. The first case of the memorandum on p. 369 may serve as an illustration of the "*feste*."

It will be noticed that Sumerlyda the priest appears both on the side of those who take the "*feste*" and on that of those who "find" it.

[4] In the Warmington instance quoted above several persons are named who appear as *festermen* in other cases, — Frana, Osferð, Sumerlyda priest, etc. Yet there is no talk of "*feste*," but of "*gewytnes*." This goes well with the fact that in this case the memorandum treats of an agreement or declaration (*swutelung*) and not of a sale. In another instance where *festermen* occur, their action is distinct from that of a moot of three hundreds which witnesses the transaction, p. 370: "Ealdulf, aþ and Alfuold bohton oðer healfe hyde," etc. The same distinction is observed in the case of Eston (p. 370), Bainton (Badingtun) (p. 371).

[5] P. 369: "Þis synd þa festermen þe Friðolf and his brodra fundel Ældulfe aþ æt þat lande æt Waltune . . . þonne is þer *borh hand* Frena and Wulnod Clacces Sune, and Ætlebrant æt pilesgeate, and Cnut and Styrcyr on Uptune, and Boia on Mylatune, and Drabba his broðor. . . . Four and tuentig æcere is þes wudes, and XXII hæredlandes buton oðrum gemænum þe Ealdulf aþ geþohte æt Cyneferðe, and wes Vlf doddes sune borhhand and Eincund and siððon eal Wepentac, and æt Hungife 20 æcera, and weś Eadric litle borhhand, and Fastolf preost, and Orm. p. 371: Þis synd þa *borhhanda* þe Swuste and hire dohter funden Ældulfe aþ æt oðre ælfe hyde æt Lunding-

festermen: they stand pledged to act as securities in regard to the transfer of land. In what concrete forms such pledges were made good, what responsibility was incurred by the sureties, we do not know, but the principle itself is clear and important enough. Third persons intervene in cases of sale or exchange: they vouch for the validity of the title transferred. The number and quality of these sureties are not established by a uniform rule: they are three or more, up to eight or thirteen, and we have no means of judging why their numbers get increased or lessened. The names of the same *festermen* recur very often in different cases, as those of influential witnesses of charters might do: Frena, Osgod, Hudeman, are mentioned again and again. Some of these names are Saxon, but many are Scandinavian, — Sumerlyda, Styrcyr, Thúr,[1] etc.: Ulf might suit both nationalities. It is not without meaning that with many of these names places are connected. This shows that the *festermen* were mostly taken, not from the population of one or other particular township, but from places scattered sometimes over several hundreds in Northamptonshire, and possibly even in an adjoining county, *e. g.*, Huntingdonshire.[2] We shall hardly be mistaken in seeing in these people representatives of influential county families.

The *festermen* are chosen or "found" by one of the contracting parties, the one transferring title, and they must have acted to a certain extent as his personal friends, or at any rate as persons willing to assume responsibility in a transaction initiated by him. In one instance a man who "takes the *feste*" on behalf of the buyer appears at the same time as one of the *festermen* found by the seller, — an indication that the fact of being a *festerman* did not involve a one-sided partiality in favor of one of the parties concerned.

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tune, p. 369. Ða Ealdulf ab bohte þane toft æt Godinge on Waltune, þa was him boroh Ulf, and Eincund, and Grim on Castre."

[1] Sumerlyda, *e. g.*, is a name which occurs in the family of the Lords of the Isles. It means literally the "summer soldier," the warrior engaged on a summer campaign. My attention has been called to this coincidence of names by my friend Rev. C. Plummer.

[2] Of the thirteen *festermen* of the first entry on p. 369, intervening in a sale in Warmington in the hundred of Wilebróc, the first comes from Aschurch (Asencirce) in the hundred of Naresford, the second from Denton, hundred unknown, the third from Stoke, in Pochbróc, the fourth from Byrnewell, Pochbróc, the fifth from Finnesthorp (?), the sixth from Lullington (Luddington), in Pochbróc, the seventh from Southwick, in Wilebróc, the tenth from Elton, Hunts, and the eleventh from Cattworth, Hunts.

There is a curious connection between the action of the individual *festermen* and that of a *gemót*. This last may itself be described as standing pledge (*borhhand*). It comes in, as it were, as a higher instance in the same process of providing security for transactions.[1]

The *feste* was meant to confirm the validity of the transfer and not to ensure its execution. Therefore land could be guaranteed to be "clean,"[2] or, as we should say, the title to the land could be pronounced to be unobjectionable both by individual sureties and by the *gemót*, while the delivery of the estate according to agreement could not concern the *gemót* otherwise than in the latter's judicial capacity. There is, moreover, an indication of the fact that sureties had to be given to guarantee the transaction on behalf of the kindred, the *mægth*, of the seller.[3] This is a very important feature, as it discloses the principal object of the institution: it was necessary to provide against the action of relatives trying to contest the alienation, and the best means for guarding against such attempts was evidently to obtain securities from the kindred itself.

Festermen occur once or twice in Anglo-Saxon evidence outside our document; they are mentioned as sureties for good behavior in the case of the appointment of a priest, in the law of the Northumbrian priests.[4] But the most interesting coincidence is again presented by Scandinavian law. The *feste* is a necessary element in the transfer of land, and other important contracts, in Swedish law.[5] The *fastar* appear in full court at the invitation of the seller or the donor; they have to see, and to proclaim, that the law has been followed strictly in every respect. Their prolocutor, the *forskialamaþer* or *skilaman*, speaks in their behalf and pronounces the formula concluding the transaction. And what is more, there is the same relation between the action of the *fastar* and that of the public court as in England. Indeed, the president of the latter, the *häradshövding*, for instance, may be called upon to take the part of the *skilaman*,

[1] P. 369: "Þa Elfric ealdorman bohte þat land æt Leobrantestune æt Frenan on ealles heres gemote on hamtone þe wes eal se here *boruhhand clenes landes*."

[2] Thorpe, Diplom., 338: "Ða astód Ðurcil Hwíta up on þam gemóte, and bæd ealle þa þegnas syllan his wife *þa landes clæne* þe hire mæge hire geúðe, and heo swa dydon, and Ðurcil rád ða to Sce Æþelberhtes mynstre, be ealles þæs folces *leáfe and gewitnesse*."

[3] P. 369 (Beringafeld).

[4] North. pr. l. 2. *Cf.* Steenstrup, Danelag, 381, 382.

[5] Amira, Nordgerman. Obligationenrecht, i. 274 ff.

or prolocutor. In Norwegian and Icelandic law the process was not developed with such elaborate completeness as in Sweden. Still, in a less sharply marked form, we may recognize the *festermen* in the *vitnar* of Norwegian and Icelandic law, — who sometimes act as sureties called up to guarantee the validity of transactions.[1] Indeed, in the case of one contract, that of marriage, the *feste* still kept a form analogous to that presented by the transfer of landed property. Right marriage is concluded by a *fæstermál*, an act of confirmation, in which the relatives and friends of the contracting parties play a prominent part; one of them acts as *forspreka*, prolocutor. Nor is it to be forgotten that the wedding of old English law appears as the same kind of ceremonial contract in which not only *weds* are exchanged, but which is settled with the help and confirmation of friends standing surety. One of these, on each side, is emphatically a prolocutor, a forspeaker.[2]

In Danish law these features of customary contract are even more attenuated than in Norwegian and Icelandic legal custom. The *skötning* before the *thing* in cases of land transfer, and the participation of kinsmen and friends backing both sides in the case of wedding, are, however, still clearly perceptible in this variety of Scandinavian law.[3]

3. In nine of the cases of transfer recorded in our memoranda we are expressly told that the sale or exchange took place in a *gemót*. Generally the *gemóts* mentioned are those of hundreds, or rather of combinations of hundreds. Twenty acres of wood and field were sold before a moot of two hundreds at "Dicon"[4] (at the dyke, or at Dykham?). As the plot lay in Badingtun, — Bainton near Bernack, — the moot in question must have been that of the double hundred of Næsseburgh or Uptongreen, in the farthest northeastern corner of the county, by the monastery.[5] A double hundred is mentioned once more in connection with a sale of some land in a place called Anlafestune. The same *gemót* is spoken of as that of a *wapentake* in the case of a minor sale.[6] As a matter of fact the Næsseburgh hundred, lying on the border of Lincolnshire, was

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[1] Amira, o. c. ii. § 26.

[2] *Wifmannes beweddung*. Liebermann, Gesetze, i. 442.

[3] Madsen, Dansk Retshistorie, ii. 30.

[4] Cart. Sax., iii. 370.

[5] P. 371.

[6] Victoria County Hist. of Northamptonshire, i. *Cf.* Hundred and Wapentake of Wiceslea, Dd. i. 220 b.

commonly treated as a *wapentake*. The varying designation of the division by a Saxon and a Scandinavian term, it may be said in passing, is in itself characteristic of a district which had been strongly held by the Danes, and where Scandinavian influence manifests itself in a number of facts.[1]

Combined moots of three hundreds are mentioned twice. One of these was held at a place called Withred's Cross, and, to judge by the village where the land was sold and the names of the witnesses, it must have been a court held jointly by the hundreds of Naresford, Wilebroc, and Pochebroc.[2] The same court was seemingly meant in the case of the purchase of one hide and a half in Swift (?). It is said to have met at Oundle, in the hundred of Pochebroc.[3] Oundle is mentioned in two other cases as the seat of a moot of eight hundreds.[4] This moot is also said to have been assembled once at Wermington in the hundred of Wilebroc. The jurisdiction over eight hundreds is one of the great features of the franchise of Peterborough in feudal times. The abbey held a court for the hundreds of Wilebrook, Pochbróc, Naresford, Hocheslau, Ordinbarrou, and the double hundreds of Næsseburgh and Neveslund.[5] The "eight hundred" franchise is insisted on in the spurious charter of Edgar entered in the MS. of the Chronicle, and there may be some doubt whether the references to the eight hundreds may not be misplaced corrections of the twelfth century copyist in instances where his authority, the original memorandum, spoke of moots of three hundreds, as in one of the Oundle cases (VIII instead of III). But similar combinations of several hundreds occur elsewhere, quite apart from any ecclesiastical franchise.[6] The matter must be left to antiquarians to decide: for our purpose the courts of three hundreds are as characteristic as a court of eight.

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[1] It is noteworthy that the numerals presenting combinations are often expressed in the Northamptonshire geld roll according to the Danish and not the English system. *Spelhoh* hundred, *e. g.*, is said to contain "*foursydene tuenti hydes — firsindstyve*," or "*firs*," as a Dane would say nowadays. The Old English would have been *hundeahtatig* or, shortened, *eahtatig*. Upton grene is numbered as "*fifsydene twenti hides*" — "fems." Ellis, Introduction to Domesday, 184 ff.

[2] Cart. Sax., iii. 370.

[3] "Ib. Ealdulf aþ and Alfuold bohton oðer healfe hyde æt Swifte mid eahte pundun. þonne sind festermen . . . on þeræ þreora hundred gewytnesse into Undelum."

[4] P. 369 (Beringafeld); p. 371 (Badingtun; Lundingtun).

[5] *Cf.* Bridge, Hist. of Northamptonshire, ii. 489 *a*.

[6] *E. g.*, a moot of ten *wapentakes* in Lincolnshire. Bracton's Notebook, pl 1730. *Cf.* Chadwick, Studies on Anglo-Saxon Institutions, 249 ff.

In one remarkable case the witnessing body is the shiremoot assembled at Northampton under the designation *ealles heres gemót on Hamtone*, the moot of the whole *here* at Hampton. The Scandinavian *couleur locale* of Northamptonshire is drastically expressed in these words. The Danish *here*, though subdued by Edgar, had still retained its peculiar cast and name, and it is only natural that many features of legal custom within its jurisdiction should receive their explanation rather from Scandinavian than from Mercian or West Saxon law.

Once the memorandum gives the text of a notice as to an exchange of lands between Bishop Æthelwold and Wlstan "Uccea," in consequence of which Peterborough Abbey got an estate at Ailsworth in the hundred of Næsseburgh. The transaction was witnessed by the king and his *witan*, and recorded in a written declaration (*swutelung*) of a kind which is not uncommon at that time.[1]

The action of these assemblies is described sometimes as "witnessing," but in two cases, namely those of the *shiregemot* and of the *wapentake*, the moots "stand pledge" (*boruhhand*) to the transfer of land.[2] The combination of standing witness and standing security reminds us of a similar accumulation of legal features in the case of written deeds, in which the witnesses (*testes*) appear usually as consenting and corroborating parties.[3] It is not merely an "insinuation" as required by later Roman law,[4] a registration by an assembly wielding local government power. The publicity of the proceeding and its committal to the memory of the members of the court were certainly an important feature. But the *shiregemot* is distinctly said to vouch for land being "clean," and this shows that it decided as to the title itself. This is easily explained by the fact that the public moots were the ordinary centres of voluntary jurisdiction, and at the same time had to lay down the law in case of litigation. The best way to be on the right side in case of the latter was to obtain from the very beginning a declaration of the moot.[5]

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[1] Cart. Sax., 371, n. 1131.

[2] P. 369: "and he bohte æt Orme XII æceras and was Vlf borhhand, and Eincund and siððon eal wepentac."

[3] Cf. Maitland, Domesday and Beyond, 250.

[4] Girard, Manuel de Droit Romain, 937.

[5] An interesting example of such a preliminary declaration is afforded by the case described in King Alfred's will, Cod. Dipl., 314: "Ða lædde ic Aðulfes cinges yrfegewrit on úre gemót æt Langandene, and hit arædde beforan eallum Westsexna

Towards the close of Anglo-Saxon history it appears as a rule that any change of land ownership should be made known to the county or to the hundred. The hundred *gemóts* and the shires at the time of the Domesday Survey constantly refer to their having received, or not received, writs, or signet, or message, in regard to the tenure of such and such an estate, and some of these references apply to the reign of King Edward.[1] This means that even books and royal commands had to be produced before the shire or the hundred *gemót* in order to secure title. The inference would be that folk right transactions were even more bound up with formal acts and declarations in public courts.

In this connection it is impossible to disregard the fact that publication at a *thing*, "*tinglysing*," was one of the requirements for the validity of all transactions conferring land ownership in Scandinavian law.[2] The main point in conveyancing in Denmark, Norway, and Sweden was to bring the matter through the popular court in order that there should be a chance for the assertion of any interests hostile to the proposed transactions, and that its ultimate conclusion should be witnessed and declared to be according to law by popular authority. In a sense this form presents the exact counterpart of the action of the public notary in countries where there existed the institution of the public clerk, watching over the regularity and soundness of transactions. In this case the place of the authorized notary is characteristically taken by the *gemót* or *thing* and by its presiding officer, the *höv-ding*, to whom the sheriff or hundredman would correspond in English practice.

It would be impossible to say, however, on the strength of our evidence, how far the co-operation of the moot was obligatory in England in the second half of the tenth century. The Medhamstead memoranda would, if construed strictly, speak against its necessity, because, although they evidently lay great weight on the presence of the court, they mention it expressly only in nine cases out of thirty-four. It might be pleaded perhaps that the

witum. Ða hit aræd waes, ða bæd ic hy ealle, for minre lufan, and him min wedd beád ðæt ic hyra næfre nænne ne oncuðe forðon ðe hy on riht spræcon, and ðæt hyra nán ne wandode ni for minum lufan ne for minum ege, ðæt hy ðæt folcriht árehton . . . and hy ða ealle tó rihte gerehton and cwadon, ðæt hy nán rihtre riht gepencan ne mihtan, ne on ðam yrfe-gewrite gehyran. Nu hit eall ágán is on ðæron oð ðine hand: ðonne ðu hit becweðe and sylle swá gesibre handa swá fremdre, swaðer ðe leófre sy."

[1] Dom. B. i. 50, a (Tederleg); 59, b (Spersolt); 60, d (Ollantune).

[2] *E. g.*, Amira, Nordg. Oblig., i. 401 ff.; ii. 331 ff.

only courts spoken of are the extraordinary and more important ones, a single *wapentake* being referred to only once, while all the other cases refer either to moots of double or treble hundreds and even to larger bodies. But even should we waive such a special pleading, which, after all, would only open the way to a possible solution, but not establish it as the only possible one, there remains the analogy with the Scandinavian customs which admit of publicity and legal confirmation in cases where the *thing* was not present.

Norwegian law empowered people to make valid transactions before a ship of at least thirteen benches of oarsmen. A very common substitute for a *thing* was a gathering at a banquet; in sparsely populated Iceland five men were deemed to be a "flock,"[1] and were empowered to witness transactions. Altogether the *fastar* and official witnesses acted as sufficient representatives of the neighborhood, and of the *thing* when this last was not present. In later law the *lysing* had to be gone through apart from, and often after the performance of the transfer itself. But at an earlier stage the *festermen* evidently acted as a substitute for the official ring of the moot, — a very useful contrivance at a time of bad roads and rare sittings of the popular courts.

When we collect all the features and assign its right value to the evidence of the Anglo-Scandinavian customary process supplied by the Medhamstead memoranda, hardly a doubt is left that the different customary practices observed in transferring land proceeded from very ancient roots. They are characterized in various degrees by three main traits: symbolic tradition on the part of the principal; proclamation of the validity of the transfer by sureties; and occasional confirmation of the proceedings by the popular court, the *gemót* or *thing*. And the foregoing observations, if accepted, can hardly fail to impress on the mind a sense of the close affinity between Old English and Scandinavian law. When both elements met, as they did in Northamptonshire, they reacted powerfully on each other just because they were based on very similar fundamental conceptions.

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[1] Gulathing's Lov, 71; *cf.* Amira, ii. 335.